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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 United States of America,

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11 Plaintiff,

12 v.

13 Francisco Alejandro Betancourt-
14 Valenzuela,

15 Defendant.

No. CR-15-1875-TUC-RCC (BGM)

REPORT AND RECOMMENDATION

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17 Currently pending before the Court is Defendant Francisco Alejandro Betancourt-
18 Valenzuela's Motion to Dismiss the Indictment with Prejudice/Motion for Sanctions
19 Based on Outrageous Governmental Conduct ("Motion to Dismiss") (Doc. 32). The
20 Government filed its Response Re: Defendant's Motion to Dismiss Re: Outrageous
21 Government Conduct ("Response") (Doc. 34), and Defendant filed his Reply (Doc. 38).
22 Defendant is charged with one count of Conspiracy to Possess with Intent to Distribute
23 Cocaine and Heroin in violation of Title 8, United States Code, Section 846; one count of
24 Possession with Intent to Distribute Cocaine in violation of Title 8, United States Code,
25 Sections 841(a)(1) and 841(b)(1)(C); one count of Possession with Intent to Distribute
26 Heroin in violation of Title 8, United States Code, Sections 841(a)(1) and 841(b)(1)(C);
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1 Conspiracy to Import Cocaine and Heroin in violation of Title 8, United States Code,
2 Sections 963; one count of Importation of Cocaine in violation of Title 8, United States
3 Code, Sections 952(a), 960(a)(1), and 960(b)(3); and one count of Importation of Heroin
4 in violation of Title 8, United States Code, Sections 852(a), 960(a)(1), and 960(b)(3).
5 Indictment (Doc. 26) at 1–3. Defendant Francisco Alejandro Betancourt-Valenzuela
6 argues that his detention by United States Immigration and Customs Enforcement
7 (“ICE”), despite having been validly released pursuant to the Bail Reform Act (“BRA”),
8 18 U.S.C. § 3141, *et seq.*, warrants dismissal of the pending criminal matter pursuant to
9 this Court’s supervisory powers. *See* Def.’s Mot. to Dismiss (Doc. 32).
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13 Pursuant to LRCrim. 5.1, this matter came before Magistrate Judge Macdonald for
14 an evidentiary hearing and a report and recommendation. On December 14, 2015, an
15 evidentiary hearing was held before Magistrate Judge Macdonald, and the matter taken
16 under advisement. Amended Minute Entry 12/14/2015 (Doc. 45). After the hearing, the
17 Government provided the Court with supplemental information regarding the ICE
18 detainer, as well as the status of Defendant’s immigration case. *See* Govt.’s Suppl. (Doc.
19 46). The Magistrate Judge recommends that the District Court, after its independent
20 review, deny Defendant’s motion and release him on his previously imposed conditions
21 of release.
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26 **I. FACTUAL AND PROCEDURAL BACKGROUND**

27 On September 28, 2015, Defendant Francisco Alejandro Betancourt-Valenzuela
28 was charged in a criminal complaint and had his Initial Appearance in this matter. *See*

1 Compl. (Doc. 1); Minute Entry 9/28/2015 (Doc. 3). Defendant Betancourt-Valenzuela is
2 a Legal Permanent Resident. Order 10/9/2015 (Doc. 15) at 2. On September 30, 2015,
3 Defendant Betancourt-Valenzuela again appeared before the Court for a detention
4 hearing. Minute Entry 9/30/2015 (Doc. 4). Pre-trial Services recommended release with
5 conditions, but the Government objected noting an outstanding ICE detainer. *Id.* The
6 Court took the matter under advisement, instructing the parties to submit additional
7 briefing on the issue of factors under Section 3142(g), Title 18, United States Code, as
8 well as the impact of the ICE detainer. Minute Entry 9/30/2015 (Doc. 4).

11 On October 9, 2015, Magistrate Judge Markovich issued his Order weighing the
12 factors delineated by the BRA and denying the Government's motion for detention.
13 Order 10/9/2015 (Doc. 15). As a result, Defendant Betancourt-Valenzuela was ordered
14 released under the previously recommended conditions. *Id.* The Government appealed
15 the magistrate judge's ruling to Chief Judge Collins. Govt.'s Appeal (Doc. 16). On
16 October 15, 2015, Chief Judge Collins adopted Magistrate Judge Markovich's Order in
17 part, and added the additional condition that Defendant Betancourt-Valenzuela post a
18 \$5,000.00 cash or corporate surety bond. Amended Minute Entry 10/15/2015 (Doc. 21).
19 The surety posted a cash bond the same date, and Defendant Betancourt-Valenzuela was
20 released. *Id.* On November 6, 2015, Defendant was arraigned and indicted. Minute
21 Entry 11/6/2015 (Doc. 30).

22 On November 10, 2015, ICE agents took Defendant Betancourt-Valenzuela from
23 his Tucson residence and placed him into immigration custody. Def.'s Mot. to Dismiss at
24 7. On December 4, 2015, the Department of Homeland Security ("DHS") issued an
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1 Immigration Detainer–Request for Voluntary Action to secure Defendant’s presence at a
2 hearing regarding his motion to continue trial before Chief Judge Collins. *See* Minute
3 Entry 12/8/2015 (Doc. 39); Govt.’s Suppl. (Doc. 46), Immigration Detainer (Exh. “1”).
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5 On December 14, 2015, the Immigration Judge granted DHS’s Motion to
6 Administratively Close Defendant Betancourt-Valenzuela’s removal proceedings.
7 Govt.’s Suppl. (Doc. 46), Order 12/14/2015 (Exh. “2”).
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9 10 **II. ANALYSIS**

11 Defendant seeks dismissal with prejudice of the pending criminal matter or in the
12 alternative a finding that ICE is in contempt of court if Defendant Betancourt-Valenzuela
13 is not released from its custody within a specified time frame. *See* Def.’s Mot. to Dismiss
14 (Doc. 32).
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16 **A. *The Bail Reform Act of 1984***

17 The Eighth Amendment to the United States Constitution provides that
18 "[e]xcessive bail shall not be required . . ." U.S. Const. amend. VIII. Congress in
19 enacting the BRA, determined that any person charged with a criminal offense *shall* be
20 released pending trial: a) on personal recognizance; b) upon execution of an unsecured
21 appearance bond; or c) on a condition or combination of conditions, *unless* “the judicial
22 officer finds that no condition or combination of conditions will reasonably assure the
23 appearance of the person as required and the safety of any other person and the
24 community[.]” 18 U.S.C. § 3142(e)(1); *see also* 18 U.S.C. § 3142(a), (b). Moreover,
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26 “[o]nly in rare cases should release be denied, and doubts regarding the propriety of
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1 release are to be resolved in favor of the defendant.” *United States v. Santos-Flores*, 794
2 F.3d 1088, 1090 (9th Cir. 2015) (citations omitted).

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4 In this case, Defendant Betancourt-Valenzuela was granted pre-trial release with
5 conditions including the posting of a \$5,000.00 cash bond. To date, Defendant has not
6 violated his conditions of release.

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8 ***B. Immigration and Nationality Act***

9 United States immigration law is embodied in the Immigration and Nationality
10 Act of 1965 (“INA”), as amended. 8 U.S.C. § 1101, *et seq.* The United States Secretary
11 of Homeland Security is “charged with the administration and enforcement of [the INA]
12 and all other laws relating to the immigration and naturalization of aliens, except insofar
13 as this chapter or such laws relate to the powers, functions, and duties conferred upon the
14 President, Attorney General, the Secretary of State, the officers of the Department of
15 State, or diplomatic or consular officers[.]” 8 U.S.C. § 1103(a)(1).

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18 The Government asserts that for purposes of Defendant Betancourt-Valenzuela’s
19 removal proceedings, ICE’s custody is proper, because subject to exceptions not relevant
20 here, “an alien who is an applicant for admission, if the examining immigration officer
21 determines that an alien seeking admission is not clearly and beyond a doubt entitled to
22 be admitted, the alien shall be detained for a proceeding under section 1229a [of Title 8,
23 United States Code.]” 8 U.S.C. § 1225(b)(2)(A). Because Defendant Betancourt-
24 Valenzuela was returning to the United States from Mexico at the time of his arrest, he is
25 considered an “applicant for admission.” 8 U.S.C. § 1101(a)(3). Section 1225, Title 8,
26 United States Code is entitled “Inspection by immigration officers; expedited removal of
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1 inadmissible arriving aliens; referral for hearing.” Despite the Government’s strenuous
2 assertion that this section provides authority for Defendant’s current detention by ICE,
3 Supervisory Detention and Deportation Officer Marco Mendoza testified at the
4 evidentiary hearing that Defendant’s release was the result of an administrative error by
5 ICE. Officer Mendoza further testified that ICE removal proceedings cannot continue
6 while a criminal case is pending against the defendant.
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9 ***C. Removal Proceedings***

10 The Supreme Court of the United States has held that “Congress, justifiably
11 concerned that deportable criminal aliens who are not detained continue to engage in
12 crime and fail to appear for their removal hearings in large numbers, may require that
13 persons such as respondent be detained for the brief period necessary for their removal
14 proceedings.” *Demore v. Kim*, 538 U.S. 510, 513, 123 S.Ct. 1708, 1712, 155 L.Ed.2d
15 724 (2003). As such, “[d]etention during removal proceedings is a constitutionally
16 permissible part of that process.” *Id.* at 531, 123 S.Ct. at 1721–22. Here, it is undisputed
17 that Defendant Betancourt-Valenzuela’s removal proceedings have been administratively
18 closed, and as such, there are no pending removal proceedings. Moreover, Officer
19 Mendoza testimony indicated that while his criminal case is on-going, removal
20 proceedings will not be reinstated.
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24 ***D. Dismissal of the Indictment***

25 In his motion, Defendant relies heavily on *United States v. Trujillo-Alvarez*, 900
26 F.Supp.2d 1167 (D. Ore. 2012). In *Trujillo-Alvarez*, the defendant was arrested for
27 driving with a suspended driver license. *Id.* at 1171. As a result, the defendant came to
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1 the attention of ICE and served with a Notice of Intent/Decision to Reinstate Prior Order
2 (Form I-871) and advised of his rights. *Id.* The defendant's prior order of removal was
3 reinstated. *Id.* The defendant was also indicted by a grand jury in the District of Oregon
4 and charged with one count of illegal reentry. *Id.* At his detention hearing, defendant
5 Trujillo-Alvarez was released on conditions set by the court. *Trujillo-Alvarez*, 900
6 F.Supp.2d at 1172. ICE took Trujillo-Alvarez into ICE custody and removed him from
7 the District of Oregon. *Id.* The *Trujillo-Alvarez* court attempted to reconcile the BRA
8 and INA, and while conceding that "[t]he government may be correct that ICE retains the
9 ability to take Mr. Alvarez-Trujillo back into administrative custody—for the purpose of
10 deporting him[,]” the court held that “nothing permits ICE (or any other part of the
11 Executive Branch) to disregard the congressionally-mandated provisions of the BRA by
12 keeping a person in detention for the purpose of delivering him to trial when the BRA
13 itself does not authorize such pretrial detention.” *Id.* at 1178.

14 The Government distinguishes *Trujillo-Alvarez* because the defendant in that case
15 had a prior order of removal. In the instant case, Defendant Betancourt-Valenzuela was
16 held in ICE custody for the purposes of a removal proceeding. That removal proceeding,
17 however, has been administratively closed and will not commence prior to the resolution
18 of this criminal proceeding. Moreover, the Immigration Detainer–Request for Voluntary
19 Action indicates that “DHS transferred the subject to your custody for a proceeding or
20 investigation” with directions to the United States Marshal that “[u]pon completion of the
21 proceeding or investigation for which the subject was transferred to your custody, DHS
22 intends to resume custody of the subject to complete processing.” Govt.’s Suppl. (Doc.

1 46), Exh. “1” at 1. In light of the testimony that ICE will not continue removal
2 proceedings until after the criminal case is resolved, the plain language of the form
3 suggests that “proceeding” refers to the criminal matter currently pending. Additionally,
4 the parties do not dispute that while on pre-trial release, Defendant Betancourt-
5 Valenzuela remains “in custody.” *Hensley v. Municipal Ct.*, 411 U.S. 345, 351, 93 S.Ct.
6 1571, 1575, 36 L.Ed.2d 294 (1973) (defendant subject to pre-trial release conditions is
7 “in custody” because “he is subject to restraints ‘not shared by the public generally[.]’”)
8 (citation omitted).

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11 Despite ICE’s “administrative error” giving rise to Defendant Betancourt-
12 Valenzuela’s belated incarceration, the Court finds that this does not rise to the level of
13 outrageous conduct required for dismissal of the indictment. Furthermore, because there
14 are no removal proceedings currently pending, the Court finds that Defendant
15 Betancourt-Valenzuela should be released subject to his previously imposed conditions.
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18 19 **III. CONCLUSION**

20 The Court finds that the Government’s conduct in this matter is not sufficiently
21 outrageous to warrant dismissal of the indictment. As such, Defendant’s motion to
22 dismiss should be denied.
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25 26 **IV. RECOMMENDATION**

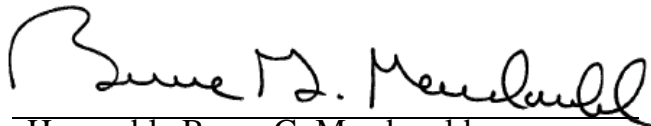
27 For the foregoing reasons, the Magistrate Judge recommends that the District
28 Court DENY Defendant Francisco Alejandro Betancourt-Valenzuela’s Motion to Dismiss

1 the Indictment with Prejudice/Motion for Sanctions Based on Outrageous Governmental
2 Conduct (Doc. 32). The Magistrate Judge further recommends that Defendant
3 Betancourt-Valenzuela be released subject to his previously imposed pre-trial release
4 conditions.
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6 Pursuant to 28 U.S.C. §636(b) and Rule 59(b)(2) of the Federal Rules of Criminal
7 Procedure, any party may serve and file written objections within fourteen (14) days after
8 being served with a copy of this Report and Recommendation. No reply shall be filed
9 unless leave is granted from the District Court. If objections are filed, the parties should
10 use the following case number: **CR-15-01875-TUC-RM**.
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12 Failure to file timely objections to any factual or legal determination of the
13 Magistrate Judge in accordance with Fed. R. Crim. P. 59 may result in waiver of the right
14 of review.
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16 Dated this 23rd day of December, 2015.
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20 Honorable Bruce G. Macdonald
21 United States Magistrate Judge
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